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No. 94-955

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

WORCESTER COUNTY, MARYLAND, *et al.*,

Petitioners,

v.

HONISS W. CANE, JR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Fourth Circuit, which remanded this case to the district court for further remedial proceedings, is ripe for review by this Court at this time?

2. Whether the Fourth Circuit in this Voting Rights Act case correctly held the district court's findings of fact supporting petitioners' liability not to be "clearly erroneous?"

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents submit this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Plaintiffs-respondents, black voters of Worcester County, Maryland, filed this class action in November 1992 challenging the at-large, designated-post election system used to elect county commissioners. Despite Worcester's one fifth black population, never in the County's 253-year history has an African-American candidate been elected to any public county office. The black voters allege that this absolute exclusion of African Americans from county office results from interaction between Worcester's at-large election system, racially polarized voting, and social and historical conditions.

Following a trial in November 1993, the district court held for the plaintiffs, ruling that Worcester's system dilutes minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, as interpreted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In keeping with the three-pronged *Gingles* test, the trial court found first that the black population of Worcester County is sufficiently large and geographically compact to form a majority in a single-member district.[1] Pet. App.

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[1] Petitioners' statement of facts contains several inaccuracies with respect to the electoral plans submitted by plaintiffs to illustrate proof of *Gingles* factor one. At trial, plaintiffs offered three, not two, alternative single-member district plans. Two of the plans included one majority-black commissioner district among five districts, and the third

21a-22a. It and the court of appeals agreed that the plans introduced by plaintiffs to illustrate proof of *Gingles* factor one comported with traditional districting principles and did not rely upon districts that were geographically bizarre. Pet. App. 10a, n.6; 21a-22a.

Second, the court found that black voters in Worcester County are politically cohesive, usually voting for black candidates in elections in which black candidates run for office. Pet. App. 23a-27a. In contrast, white Worcester voters rarely support black candidates, thus demonstrating white bloc voting sufficient to defeat black candidates of choice and to satisfy *Gingles* factor three. The district court found that on average no more than 19 percent of white voters support black candidates. Pet. App. 30a. Petitioners do not dispute the court's findings with respect to either black political cohesion or white bloc voting, conceding that voting is racially polarized in

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plan included two majority-black commissioner districts among seven districts. Contrary to the petitioners' representation, the black voting age populations (VAP) of the majority-black districts in the five district plans were 57.8% (not 60.1%) and 62.1% (not 65.1%). Pet. App. 21a, n.4. The majority-black districts in the plaintiffs' seven-district plan included black VAPs of 55.1% and 50.1%. Also contrary to petitioners' representation, the majority black districts in plaintiffs' five-member plans were not "substantially identical," and cannot accurately be treated as one, as petitioners claim, even "for ease of reference." Pet. at 3, n.1. One of the plans included portions of Worcester County's southernmost town of Pocomoke City, while the other plan excluded Pocomoke entirely -- a rather substantial distinction, given petitioners' claimed objection to transgression of municipal boundaries. Moreover, the black voting populations of the two districts differ significantly.

Worcester County, in satisfaction of *Gingles* factors two and three.

Beyond the three *Gingles* factors, the district court assessed the array of factors set out by the Senate as pertinent to analysis of a Section 2 claim. S. Rep. No. 97-417, 97th Cong. 2d Sess. 28 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206-07. Quite contrary to petitioners' representation, the trial court made extensive findings regarding the "totality of the circumstances" that bear upon racial politics in Worcester County. *See infra* at 13-15.

Based upon findings of racially polarized voting, the history and lingering effects of racial discrimination in Worcester County, and the structure of the County's election system, the court concluded that Worcester's at-large, designated-post system "interacts with past and present discrimination to deprive African-Americans of Worcester County [of] the same 'opportunity as other members of the electorate to participate in the political process and to elect representatives of their choice.'" Pet. App. at 31a, *quoting* 42 U.S.C. § 1973(b).

Although the court solicited County proposals to remedy the Section 2 violation, Worcester County proposed only a plan that would have maintained an at-large, designated-post system. The court rejected Worcester's plan and ordered the County to implement a cumulative voting plan, reasoning that this plan would be more consistent with the County's preference for at-large voting than would a single-member district plan.

The United States Court of Appeals for the Fourth Circuit unanimously affirmed the district court's ruling that Worcester's election system dilutes minority voting strength in violation of the Voting Rights Act. However the appellate court differed with the district court's choice of a cumulative voting remedy, reversing and remanding for additional remedial proceedings. The Fourth Circuit later unanimously denied the County's petition for rehearing and suggestion for rehearing *en banc*.

The district court conducted proceedings in accord with the appellate court's mandate, and the record has been expanded through proceedings on remand. The trial court considered four proposed remedial election plans, three that were proposed by the defendants, and one that was proposed by the plaintiffs. An evidentiary hearing regarding remedies was conducted by the district court on December 2, 1994.

On January 6, 1995, the district court rejected plaintiffs' proposed single-member district plan in favor of a remedy that combines a district plan proposed by the defendants with a cumulative voting scheme.[2] Under the district court's ruling primary elections for Worcester County Commission will be conducted by defendants' proposed single-member district plan, and general elections will be conducted under a cumulative voting scheme. The plans submitted by the plaintiffs at trial to

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[2] A single copy of the district court's January 6 Memorandum and Order has been lodged with the Clerk's office of this Court.

illustrate proof of *Gingles* factor one play no part in the remedy adopted by the court.

On January 10, 1995, the Worcester County Commissioners noticed an Appeal of the district court's new remedial ruling to the United States Court of Appeals for the Fourth Circuit.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision is an interlocutory opinion that remanded the case to the district court for further proceedings. As such, it is not yet ripe for review by this Court.

Furthermore, the Fourth Circuit's decision does not present the questions raised in the petition for certiorari. Rather, petitioners seek to have this Court review and disturb the factual findings entered by the district court and affirmed by the Fourth Circuit on appeal. Because it is not the general practice of this Court to engage in review of factual findings concurred in by two courts below, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. THE OPINION BELOW REMANDING THIS CASE FOR FURTHER REMEDIAL PROCEEDINGS IS NOT RIPE FOR REVIEW

The Fourth Circuit remanded this case to the district court for further proceedings. Pet. App. 15a-16a.

These additional proceedings have altered the posture of the case and changed the issues presented, thereby affecting the appropriateness of review by this Court, particularly when petitioners are seeking to present constitutional issues. At this time, the case simply is not ripe for plenary review. *See, e.g., Virginia Military Institute v. United States*, 113 S.Ct. 2431 (1993) (Scalia, J., concurring in denial of certiorari)(case not ripe for Supreme Court review where court of appeals remanded for determination of remedy); *Brotherhood of Locomotive Fireman v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967)("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916) ("except in extraordinary cases, the writ [of certiorari] is not issued until final decree"); *see generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 195-98 (7th ed. 1993). No reason exists here to depart from the general rule against review of interlocutory judgments.

In the interim between Worcester County's filing of its petition in this Court and respondents' filing of this response, the district court has ordered implementation of a new remedial plan. That plan has not yet been reviewed by the Court of Appeals, although such review is pending. It would usurp the role of the Court of Appeals for plenary review to be undertaken at this juncture. Moreover, such premature review would run contrary to the restraint usually exercised by this Court:

> No rule of practice of this Court is better settled than "never to anticipate a question

> of constitutional law in advance of the necessity of deciding it."

Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 71-72 (1961) (citations omitted).

The interlocutory nature of the decision below also requires rejection of petitioners' suggestion that this Court "withhold its disposition" of the petition pending resolution of certain constitutional challenges to congressional redistricting plans. Pet. at 21. Even if, contrary to fact (*see infra* at 9-12), the constitutional cases relied upon by petitioners raised issues relevant to disposition of this case, the courts below should and will have a full opportunity to address any new decisions in the course of the further proceedings being conducted herein.

II. NO SPECIAL OR IMPORTANT REASON FOR THE ISSUANCE OF A WRIT OF CERTIORARI EXISTS AS REQUIRED BY RULE 10

This case is a "first generation" challenge to racial discrimination in Worcester County's political system, more akin to cases litigated in the 1970s across the Deep South than to those raising 1990s nuances. As such, it presents no issue under the Voting Rights Act that is significant or novel. It, therefore, poses no issues meriting plenary review by this Court.

A. Petitioners Seek Review of Factual Findings Entered by the Trial Court and Affirmed by the Court of Appeals

The courts below found that the electoral plans submitted by plaintiffs to illustrate proof of *Gingles* factor one closely followed traditional districting principles and triggered no concerns about "racial gerrymandering." These decisions concerning plaintiffs' proof of *Gingles'* geographical compactness element are consistent with the decisions of this Court and the courts of appeals. Petitioners have cited no case illustrating any conflict among the circuits with respect to this element of a Section 2 claim. Indeed, other circuit courts that have addressed this issue in the post-*Shaw* era have ruled just as did the Fourth Circuit here. *See, e.g., Clark v. Calhoun County, Miss.*, 21 F.3d 92, 96 (5th Cir. 1994); *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 277-78 (2d Cir. 1994), *vacated on other grounds*, 115 S.Ct. 35 (1994).

The Fourth Circuit found that plaintiffs' illustrative plan "is not geographically bizarre. Rather, it is similar in appearance to one of the former residency districts" under the County's prior electoral schemes. Pet. App. at 10-11a, n.6. Also contrary to petitioners' allegations, the court of appeals held

> the undisputed evidence indicated that the single-member district plans proposed by Plaintiffs adhered to other traditional

> districting principles such as the historical north-south division of the County and the natural boundaries created by County waterways. In addition, the uncontradicted evidence before the district court revealed that the citizens within the proposed majority African-American district shared common socioeconomic and political concerns. *Shaw,* 113 S.Ct. at 2827. Drawing districts based on such common interests is perhaps one of the most often invoked districting principles. *See, e.g., Gaffney v. Cummings,* 412 U.S. 735, 752-53 (1973).

Id.

Petitioners claim this case is similar to *United States v. Hays,* 63 U.S.L.W. 3454 (Dec. 13, 1994), and other constitutional challenges to congressional redistricting plans now pending in this Court. Pet. at 10-12 & n.3. It simply is not such a case. Plaintiffs' single-member district plan ultimately was employed only for proof of *Gingles* factor one, not as a court-ordered remedial plan. Any issue petitioners might have raised under *Shaw* with respect to plaintiffs' plan evaporated with the district court's January 6 decision deferring to the County's opposition to that plan for remedial use.

Hays and the other progeny of *Shaw v. Reno* raise Fourteenth Amendment claims. Various three-judge district courts have disagreed about the meaning and

reach of *Shaw*, thus presenting an issue for resolution by this Court concerning the proper evaluation of constitutional challenges to congressional redistricting plans.

This case, by contrast, presents a statutory challenge to minority vote dilution in county government. Plaintiffs raised no constitutional issue, and Worcester County advanced no constitutional defense in answering plaintiffs' complaint. The courts below evaluated the plaintiffs' Section 2 claim as directed by this Court in *Thornburg v. Gingles*. Neither the district court nor the Fourth Circuit had occasion to consider *Shaw*-type questions, except to conclude that plaintiffs' proposed plans were not bizarrely shaped and were based on traditional districting principles. The court had no occasion to consider, for example, what state interests supported any particular remedial plan, or how best to tailor the plan to achieve the state's interests, because the County, being opposed to a remedy, advanced no interests to support a remedy. Plaintiffs are private actors, not government officials. As such, they are not situated to articulate the state's compelling interests in overcoming minority vote dilution, nor are they authorized to determine how the county government might decide to tailor a plan to remedy vote dilution. Courts can only review state interests and rationales when they are advanced by the state.

The County's argument that plaintiffs violated *Shaw v. Reno* by taking race into account in complying with the first prong of *Gingles* is plainly frivolous. Pet. at

2. *Gingles* requires plaintiffs in Section 2 cases to take race into account in determining whether it is possible to create majority-minority districts. To accept the County's argument would render *Gingles* a nullity, and would preclude any finding of Section 2 liability or any remedy for minority vote dilution.

This Court unanimously rejected an argument similar to that raised by Worcester County in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). In *Voinovich*, the district court concluded that "§ 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation." 113 S.Ct. at 1156. The Court disagreed. It held that Section 2 contains "no *per se* prohibitions against . . . majority-minority districts," and approved the *Gingles* requirement that Section 2 plaintiffs "must show that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district.'" 113 S.Ct. at 1157. The County's argument in this case would have merit only if the Court were to conclude that Section 2 was itself unconstitutional, a position rejected by the majority in *Holder v. Hall*, 114 S.Ct. 2581 (1994).[3]

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[3] Seven members of the Court, either explicitly or by necessary implication, rejected Justice Thomas's argument in *Holder* that the Court's Section 2 vote dilution jurisprudence was "repugnant to . . . the ideal of a color-blind Constitution." 114 S.Ct. at 2598. *Id.* at 2588 ("*Stare decisis* concerns . . . require me to reject Justice THOMAS' suggestion that we overhaul our established reading of § 2") (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2621 n.3 (the *Gingles* vote dilution analysis applies to "the case before us") (Blackmum, J., dissenting); *id.* at 2627 ("[i]t is crystal clear that Congress intended the 1982 amendment to cover non-access claims

B. The Trial Court's Liability Ruling Rests upon Extensive Factual Findings as to the Totality of Circumstances.

Secondarily, petitioners contend that review should be granted based upon their claim that the trial court failed to consider the totality of the circumstances in ruling Worcester's election system unlawful. In fact, the court thoroughly reviewed all factors pertinent to analysis of a Section 2 claim, and rested its decision on the overwhelming proof of minority vote dilution evidenced through this evaluation.

First and foremost, the court noted the striking historical exclusion of African-American candidates from public office in Worcester County:

> [I]n the entire history of Worcester County, with a 20% African-American population, no African-American has won a county office in a county-wide head-to-head contest against a white candidate. *Gingles*, 478 U.S. at 48, n.15 (one of the "most important" of the Senate Report factors in demonstrating

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like those in *Bolden* and *Gomillion*") (Stevens, J., dissenting); *id.* at 2586 ("[i]n a § 2 vote dilution suit . . . a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice") (Kennedy, J., plurality opinion). In vote dilution challenges such as this, that benchmark may properly be a system containing one or more majority-minority districts. *Id.* at 2589 (O'Connor, J., concurring in part and concurring in the judgment).

> inequality of electoral opportunity is "the extent to which minority group members have been elected to public office in the jurisdiction.")

Pet. App. 30a.

The court carefully analyzed racially polarized voting, Pet. App. 23a-31a, the second "most important" of the Senate Report factors, *Gingles*, 478 U.S. at 48, n.15, and found that it existed, a fact that is uncontested by petitioners. The trial judge further held that by structuring its system with candidate residency districts, Worcester has employed the equivalent of an "anti-single-shot" provision, a feature that "aggravates the political disadvantage of the County's minorities." Pet. App. 30a. Furthermore, petitioners fail to mention that the trial court took judicial notice of hundreds of facts and circumstances concerning the County's egregious history of racial discrimination and the lingering, debilitating effects of that history upon Worcester's black citizens. Among the facts so noticed were the enactment of state and local disenfranchisement schemes such as literacy tests and property ownership requirements for voters and candidates;[4] white voters' overwhelming past support -- lasting into the 1970s -- for racist and segregationist candidates and causes; *de jure* segregation of schools, universities, and public accommodations through the

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[4] Indeed, the property-ownership requirement for County Commission candidates remained a part of the Worcester County Code until midway through litigation of this action.

1960s; and racial segregation of fraternal organizations, churches, and private social life continuing into the present.

This discrimination results today, the court found, in severe socioeconomic disparities between black and white citizens, and manifests itself in gross racial disparities in voter registration and turnout rates. For example, the trial judge took notice that the 1990 voter registration rate for white Worcester Countians was 77 percent, but only 32 percent for black Worcester residents. The County did not dispute these facts.

It would be an unjustified departure from established Supreme Court practice for a writ of certiorari to be granted merely to review factual findings concurred in by two courts below. *See, e.g., Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949); *Baker v. Schofield*, 243 U.S. 114, 118 (1917). *See generally, Supreme Court Practice*, at 189-91. As explained by Justice Brennan, the so-called "two court rule" not only accords due deference to the courts below, but also

> is an indispensable judicial "time saver," making it unnecessary for this Court to waste its scarce time and resources on minor factual questions which have already been accorded consideration by two federal courts and whose resolution is without significance except to the parties immediately involved.

Neil v. Biggers, 409 U.S. 188, 203 (1972)(Brennan, J., concurring in part and dissenting in part.)

Here comprehensive factual findings were entered by the trial judge as to the *Gingles* factors and the totality of circumstances contributing to vote dilution in Worcester County. Upon review of these findings, the Fourth Circuit agreed with the district court that the overall facts of this case lead to the inexorable conclusion that Worcester's at-large, designated-post election system violates Section 2 of the Voting Rights Act.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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